

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KARIM KHOJA, on behalf of himself and
all others similarly situated,

Plaintiff,

v.

OREXIGEN THERAPEUTICS, INC.,
JOSEPH P. HAGAN, MICHAEL A.
NARACHI, and PRESTON KLASSEN,
Defendants.

AND ALL CONSOLIDATED CASES

Case No.: 15-CV-540 JLS (JLB)

**ORDER (1) GRANTING IN PART
AND DENYING IN PART MOVING
DEFENDANTS' REQUEST TO
CONSIDER MATERIALS
INCORPORATED BY REFERENCE,
AND (2) GRANTING MOVING
DEFENDANTS' PARTIAL MOTION
TO DISMISS**

(ECF No. 114)

Presently before the Court is Moving Defendants Joseph P. Hagan, Michael A. Narachi, and Preston Klassen, M.D., M.H.S.'s Partial Motion to Dismiss Consolidated Amended Complaint for Violation of the Federal Securities Laws ("Mot.," ECF No. 114),¹ as well as Lead Plaintiff Karim Khoja's Opposition to ("Opp'n," ECF No. 115) and Moving Defendants' Reply in Support of ("Reply," ECF No. 116) the Motion.

¹ Defendant Orexigen Therapeutics, Inc., filed a voluntary petition for bankruptcy under Chapter 11, *see In re Orexigen Therapeutics, Inc.*, No. 18-10518-KG (Bankr. D. Del. filed Mar. 12, 2018); consequently, pursuant to the automatic bankruptcy stay, *see* 11 U.S.C. § 362(a), Orexigen is not a party to this Motion, which was filed before the automatic stay was lifted.

1 Also before the Court are Moving Defendants' Request to Consider Documents
2 Incorporated by Reference into the Consolidated Amended Complaint for Violation of the
3 Federal Securities Laws in Support of Defendants' Partial Motion to Dismiss ("Defs.'
4 Req.," ECF No. 114-9), Lead Plaintiff's Notice of Supplemental Authority in Support of
5 Opposition to Defendants' Partial Motion to Dismiss the Consolidated Amended
6 Complaint ("1st Not. of Supp. Auth.," ECF No. 118), Moving Defendants' Response to
7 Lead Plaintiff's Notice of Supplemental Authorities ("Resp. to 1st Not. of Supp. Auth.,"
8 ECF No. 119), Lead Plaintiff's Notice of Supplemental Authorities in Support of
9 Opposition to Defendants' Partial Motion to Dismiss the Consolidated Amended
10 Complaint ("2d Not. of Supp. Auth.," ECF No. 126), Moving Defendants' Response to
11 Lead Plaintiff's Notice of Supplemental Authorities ("Resp. to 2d Not. of Supp. Auth.,"
12 ECF No. 127), Lead Plaintiff's Third Notice of Supplemental Authorities in Support of
13 Opposition to Defendants' Partial Motion to Dismiss the Consolidated Amended
14 Complaint ("3d Not. of Supp. Auth.," ECF No. 128), Lead Plaintiff's Notice of Recent
15 Controlling Authority ("4th Not. of Supp. Auth.," ECF No. 136), Moving Defendants'
16 Response to Lead Plaintiff's Notice of Recent Controlling Authority ("Resp. to 4th Not. of
17 Supp. Auth.," ECF No. 137), and Lead Plaintiff's Reply to Defendants' Response to Lead
18 Plaintiff's Notice of Recent Controlling Authority ("Reply ISO 4th Not. of Supp. Auth.,"
19 ECF No. 138).

20 The Court vacated the hearing and took the Motion under submission without oral
21 argument pursuant to Civil Local Rule 7.1(d)(1). *See* ECF No. 117. Having carefully
22 considered Lead Plaintiff's Consolidated Amended Complaint ("CAC," ECF No. 111) and
23 the material appropriately incorporated by reference, the Parties' arguments, and the law,
24 including the cases identified in Lead Plaintiff's Notices of Supplemental Authority, the
25 Court **GRANTS IN PART AND DENIES IN PART** Moving Defendants' Request to
26 Consider Documents Incorporated by Reference and **GRANTS** Moving Defendants'
27 Motion.

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BACKGROUND²

The factual and procedural background of this case was set forth in detail in this Court’s September 23, 2019 Order (1) Granting in Part and Denying in Part the Moving Defendants’ Request for Judicial Notice, (2) Denying Lead Plaintiff’s Request for Judicial Notice, and (3) Granting in Part and Denying in Part the Moving Defendants’ Motion to Dismiss. *See* ECF No. 110 at 2–14. To the extent relevant, the Court incorporates that recitation into this Order. Accordingly, the Court sets forth below only those facts relevant to the instant Motion³ and the procedural history since the issuance of this Court’s September 23, 2019 Order.

I. Factual Background

Orexigen, “a developmental stage biotechnology firm,” has a collaboration agreement with Takeda Pharmaceutical Company Limited (“Takeda”) to develop and commercialize Orexigen’s “primary product candidate,” a drug for the treatment of obesity called Contrave, in the United States, Canada, and Mexico. CAC ¶ 7. Phase III clinical trials have been completed, and Contrave “was being studied in a drug trial known as the

² The facts alleged in Plaintiff’s Consolidated Amended Complaint are accepted as true for purposes of Moving Defendants’ Motion. *See Vasquez v. Los Angeles Cnty.*, 487 F.3d 1246, 1249 (9th Cir. 2007) (holding that, in ruling on a motion to dismiss, the Court must “accept all material allegations of fact as true”). The Court also considers those materials outside the Consolidated Amended Complaint that are properly incorporated by reference. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2615 (2019); *see also infra* pages 7–12.

³ The Parties agree that the sole issue raised by the present Motion is whether “the Amended Complaint fails to plead with particularity that Defendants’ allegedly fraudulent statements on March 3, 2015 have any casual connection to the losses purportedly suffered by Plaintiff on May 12, 2015.” ECF No. 114 (“Not. of Mot.”) at 1; *see also* Opp’n at 1 (“Defendants do, however, suggest that Plaintiff has not adequately pled loss causation in connection with the May 12, 2015 announcement that Takeda Pharmaceutical Co. (“Takeda”) — Orexigen’s own business partner — disclosed for the first time that it was initiating a \$200 million claim against Orexigen due to Defendants’ misconduct in revealing the 25% data LIGHT Study in the March 3, 2015 Form 8-K.”). Although several of the new or revised allegations in the Consolidated Amended Complaint (“CAC”) are intended to strengthen Lead Plaintiff’s loss causation allegations as to Defendants’ May 8, 2015 statements, “[Moving] Defendants did not challenge the Original Complaint on this ground, and do not challenge the adequacy of Plaintiff’s loss causation allegations as to the May 8 statements here.” Mot. at 2. Accordingly, the Court omits those facts from its recitation of the relevant facts.

1 LIGHT Study.” *Id.* The Light Study’s Executive Steering Committee, Data Monitoring
 2 Committee, and Orexigen entered into a data access plan (“DAP”), pursuant to which all
 3 agreed to limit the number of people within Orexigen who had access to the interim results
 4 of the LIGHT Study to just those individuals who needed to facilitate submission of
 5 Orexigen’s marketing application to the United States Food and Drug Administration
 6 (“FDA”). *Id.* ¶ 53 & n.11.

7 On July 2, 2014, Orexigen filed patent application number 14/322,810 (the “’810
 8 Application”), which “included specific quantitative 25% interim LIGHT Study data,”
 9 “pursuant to a statutory ‘nonpublication’ request.” *Id.* ¶ 12. In early January 2015,
 10 Orexigen rescinded the nonpublication request. *Id.* ¶ 14. On March 3, 2015, the United
 11 States Patent and Trademark Office (“USPTO”) issued U.S. Patent No. 8,969,371 (the
 12 “’371 Patent”) from the ’810 Application. *Id.* ¶ 15; *see also* Defs.’ Req. Ex. B.

13 That same day, Orexigen filed a Form 8-K with the United States Securities and
 14 Exchange Commission (“SEC”) announcing the publication of the ’371 Patent and
 15 releasing the 25 percent interim LIGHT Study results. CAC ¶¶ 15, 87; *see also* Defs.’ Req.
 16 Ex. C. The Form 8-K noted that the ’371 Patent “incorporate[d] data from [the LIGHT
 17 Study],” and that the ’371 Patent “contain[s] claims related to a positive effect of Contrave
 18 on [cardiovascular (“CV”)] outcomes” based on an “analysis . . . conducted based on 94
 19 observed and adjudicated major adverse cardiovascular events (“MACE”), which was
 20 approximately 25% of the planned MACE for the Light Study.” CAC ¶ 87; *see also* Defs.’
 21 Req. Ex. C. The Form 8-K further explained that the interim analysis “was prospectively
 22 designed to enable an early and preliminary assessment of safety to support regulatory
 23 approval” and that “[a] larger number of MACE are required to precisely determine the
 24 effect of Contrave on CV outcomes.” *Id.* Orexigen did not consult the FDA, Dr. Nissen,
 25 or Takeda prior to filing the Form 8-K. CAC ¶ 15.

26 Also on March 3, 2015, *Forbes* released an article reporting that the FDA had been
 27 unaware that the ’810 Application contained the interim data and was “very disappointed
 28 by Orexigen’s actions.” *Id.* ¶ 93. That same day, Orexigen issued a press release stating

1 that “the USPTO published the patent and supporting documentation,” *id.* ¶ 94, but the
 2 press release failed to disclose that “the USPTO only published what Orexigen itself
 3 needlessly put into the 2014 Patent Application” or that Orexigen “had rescinded its earlier
 4 request that the 2014 Patent Application remain unpublished,” *id.* ¶ 95.

5 On March 2, 2015, Orexigen’s common stock had closed at \$5.79 per share. *Id.*
 6 ¶ 89. However, the March 3, 2015 publication of the “misleading” interim LIGHT Study
 7 data and the “misleading” response to the FDA’s statements the same day “artificially
 8 inflat[ed] the price of Orexigen’s securities” and “deceiv[ed] analysts and investors.” *Id.*
 9 ¶¶ 17, 97. That same day, common stock shares “soared almost 32% to close at \$7.64 . . .
 10 on enormous trading volume of more than 95.8 million shares,” *id.* ¶ 16, with trading as
 11 high as \$9.37 per share, *id.* ¶ 89. On March 4, 2015, Orexigen common stock “rose an
 12 additional 11% on massive volume, to close at \$8.49 per share.” *Id.* ¶ 16; *see also id.* ¶ 97.

13 In Section VI of the CAC, titled “Loss Causation and Economic Loss,” Lead
 14 Plaintiff alleges, in relevant part:

15 131. On May 12, 2015, it was also disclosed for the first
 16 time in a *Bloomberg* article, called “Takeda Threatened to End
 17 Orexigen Partnership as Study Halted,” that Takeda – Orexigen’s
 18 commercialization partner for Contrave – had initiated dispute
 19 resolution proceedings against Orexigen demanding it pay the
 20 full cost – estimated at \$200 million – of a new cardiovascular
 21 outcomes trial due to Orexigen’s materially misleading March 3,
 22 2015 statements and omissions regarding Contrave’s purported
 23 heart benefit. In a May 12, 2015 email to *Bloomberg*, Takeda
 24 spokesperson Sandy Rodriguez stated that “Takeda sent a
 25 dispute letter to Orexigen on May 12 whereby Takeda seeks
 26 termination of its collaboration agreement with Orexigen based
 27 on Orexigen’s material breach of the agreement . . .” A May 13,
 28 2015 article appearing in the *Wall Street Journal* titled “Orexigen
 and Takeda Feud Over Cost of a Controversial Diet Drug Trial”
 confirmed, *inter alia*, that: “[t]he **disclosure is causing Orexigen
 shares to drop**, since the cost of the trial is estimated to be about
 \$200 million, according to RBC Capital Markets analyst Simos
 Simeonidis, who calculates that Orexigen would be on the hook
 for as much as an extra \$100 million if it loses the dispute.”

1 Similarly, a May 13, 2015 article appearing in *Biospace.com*
 2 added that “the company stock took a big hit, dropping from a
 3 high of \$6.93 per share on May 12, the day the partnership [with
 4 Takeda] was terminated, to today’s low [on May 13, 2015] of
 \$5.48 per share.”

5 132. As a direct result of the May 12, 2015 disclosures
 6 alleged in ¶¶ . . .] 131, *supra*, which disclosed the truth for the
 7 first time regarding: . . . (iii) Takeda’s initiation of a \$200 million
 8 action against Defendants (which revealed for the first time that
 9 Defendants had failed to disclose that they had filed the March
 10 3, 2015 Form 8-K revealing the dubious 25% heart benefit data
 11 without first informing Takeda as alleged in ¶¶ 15-17, 87-89,
 12 *supra*) the price of Orexigen’s common stock fell from an
 13 opening price on May 11, 2015 of \$6.75 per share to close on
 14 May 13, 2015 at \$5.02 per share on massive trading volume as
 15 investors digested the full impact of Defendants’ materially
 misleading statements and deliberately reckless acts. Together,
 the revelations and disclosures alleged in ¶¶ . . .] 131, *supra*
 caused the Company’s share price to drop approximately 25% in
 a single day between May 12 and May 13, 2015 on unusually
 high trading volume.

16 133. The timing and magnitude of Orexigen’s common
 17 stock price declines between May 12 and May 13, 2015 negates
 18 any inference that the losses suffered by Plaintiff and the other
 19 members of the Class were caused by changed market
 20 conditions, macroeconomic or industry factors, or even
 21 Company-specific facts unrelated to Defendants’ fraudulent
 22 conduct. The Company’s share price dropped from a high of
 23 \$6.93 per share on May 12, 2015 to a low of \$5.48 per share on
 24 May 13, 2015 – a sharp decline of approximately 25%. The
 Company’s share price never recovered and Orexigen was
 thereafter delisted from NASDAQ. Chapter 11 bankruptcy later
 ensued.

25 CAC ¶¶ 131–33 (emphasis in original); *see also id.* ¶ 5 (alleging that “the loss causing
 26 disclosures on May 12, 2015 revealed the truth to the market about Defendants’ materially
 27 false and misleading statements and omissions on March 3, 2015”); *id.* (““In response
 28 ///

1 to the disclosures on . . . May 12, 2015, Orexigen’s share price fell precipitously.”) (citing
2 *id.* § VI).

3 **II. Procedural Background**

4 On September 23, 2019, this Court issued its Order (1) Granting in Part and Denying
5 in Part the Moving Defendants’ Request for Judicial Notice, (2) Denying Lead Plaintiff’s
6 Request for Judicial Notice, and (3) Granting in Part and Denying in Part the Moving
7 Defendants’ Motion to Dismiss. *See* ECF No. 110. As relevant to the pending Motion, the
8 September 23, 2019 Order determined that a May 12, 2015 press release authored by Dr.
9 Nissen “was not a corrective disclosure as to the alleged misrepresentations from March 3,
10 2015,” and accordingly Lead Plaintiff had failed to adequately allege loss causation for a
11 portion of his claims. *Id.* at 37–38.

12 On October 17, 2019, Lead Plaintiff filed his CAC. *See* ECF No. 111. On November
13 15, 2019, Moving Defendants filed the instant Motion. After briefing was complete, Lead
14 Plaintiff filed four notices of supplemental authority on January 24, May 27, June 12, and
15 October 12, 2020. *See* ECF Nos. 118, 126, 128, 136. Moving Defendants filed responses
16 to the first, second, and fourth. *See* ECF Nos. 119, 127, 137.

17 Meanwhile, on April 28, 2020, the Ninth Circuit issued an order lifting the
18 administrative closure of the appeal as to Orexigen and substituting Wind-Down
19 Administrator Province, Inc., in the place and stead of Orexigen as Defendant-Appellee.
20 *See* ECF No. 125. On May 19, 2020, in light of the bankruptcy court’s lifting of the § 362
21 automatic stay, the Ninth Circuit issued an order “fully adopt[ing its] opinion in [*Khoja v.*]
22 *Orexigen [Therapeutics, Inc.]*, 899 F.3d 988 [(9th Cir. 2018)], to resolve Plaintiff’s appeal
23 as against Defendant Orexigen.” *See* ECF No. 134 at 3. The Ninth Circuit’s judgment
24 took effect on June 10, 2020. *Id.* at 1.

25 **REQUEST TO CONSIDER MATERIALS INCORPORATED BY REFERENCE**

26 **I. Legal Standard**

27 “Generally, district courts may not consider material outside the pleadings when
28 assessing the sufficiency of a complaint under Rule 12(b)(6) of the Federal Rules of Civil

1 Procedure.” *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018)
 2 (citing *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001)). “There are two
 3 exceptions to this rule: the incorporation-by-reference doctrine, and judicial notice
 4 under Federal Rule of Evidence 201.” *Id.*

5 Pursuant to Federal Rule of Evidence 201(b), “[t]he court may judicially notice a
 6 fact that is not subject to reasonable dispute because it: (1) is generally known within the
 7 trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from
 8 sources whose accuracy cannot reasonably be questioned.” “Accordingly, ‘[a] court may
 9 take judicial notice of matters of public record without converting a motion to dismiss into
 10 a motion for summary judgment.’” *Khoja*, 899 F.3d at 999 (quoting *Lee*, 250 F.3d at 689).
 11 “But a court cannot take judicial notice of disputed facts contained in such public
 12 records.” *Id.* (citing *Lee*, 250 F.3d at 689).

13 “Even if a document is not attached to a complaint, it may be incorporated by
 14 reference into a complaint if the plaintiff refers extensively to the document or the
 15 document forms the basis of the plaintiff’s claim.” *United States v. Ritchie*, 342 F.3d 903,
 16 908 (9th Cir. 2003) (citing *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980
 17 (9th Cir. 2002); *Branch v. Tunnell*, 14 F.3d 449, 453–54 (9th Cir. 1994), *overruled on other*
 18 *grounds by Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002); *Venture*
 19 *Assoc. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431(7th Cir. 1993)). “[T]he mere
 20 mention of the existence of a document is insufficient to incorporate the contents of a
 21 document’ under *Ritchie*.” *Khoja*, 899 F.3d at 1002 (quoting *Coto Settlement v. Eisenberg*,
 22 593 F.3d 1031, 1038 (9th Cir. 2010)). Nonetheless, a document may still form the basis of
 23 the plaintiff’s claim where “the claim necessarily depended on the[document].” *Id.* (citing
 24 *Knieval v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005)). “However, if the document merely
 25 creates a defense to the well-pled allegations in the complaint, then that document did not
 26 necessarily form the basis of the complaint.” *Id.*

27 When a document is incorporated by reference, “the district court may treat such a
 28 document as part of the complaint, and thus may assume that its contents are true for

purposes of a motion to dismiss under Rule 12(b)(6).” *Ritchie*, 342 F.3d at 908; *see also* *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (“The court may treat . . . a document [incorporated by reference] as ‘part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6).’”) (citing *Ritchie*, 342 F.3d at 908). Nonetheless, “it is improper to assume the truth of an incorporated document if such assumptions only serve to dispute facts stated in a well-pleaded complaint.” *Khoja*, 899 F.3d at 1003.

II. Analysis

Moving Defendants ask the Court to incorporate by reference six documents:

- (1) “Food and Drug Administration’s (‘FDA’) September 10, 2014 ‘Center for Drug Evaluation and Research Summary Review,’ which is publicly available at https://www.accessdata.fda.gov/drugsatfda_docs/nda/2014/200063Orig1s000SumR.pdf (the ‘2014 FDA Review’),” “for background facts about the Light Study and the FDA’s regulatory process with respect to Contrave,” Defs.’ Req. at 1, 4; *see id.* Ex. A;
- (2) “United States Patent No. 8,969,371, which is publicly available at <http://portal.uspto.gov/pair/PublicPair> (the ‘371 patent’),” “for background facts about Orexigen’s U.S. patent application and the issuance of the ‘371 patent,” Defs.’ Req. at 1, 4; *see id.* Ex. B;
- (3) “Orexigen Therapeutics, Inc.’s (‘Orexigen’) Form 8-K filed with the Securities Exchange Commission (‘SEC’) on March 3, 2015, which is publicly available at <http://www.sec.gov/edgar/searchedgar/companysearch.html> (the ‘March 3 8-K’),” “so the Court has a complete picture of the information provided to investors on March 3, 2015,” Defs.’ Req. at 1, 4–5; *see id.* Ex. C;
- (4) “Carlone Chen’s www.bloomberg.com article on May 12, 2015, titled ‘Takeda Threatens to End Orexigen Partnership as Study Halted,’ which is available at <https://www.bloomberglaw.com/document/NO9IEU6JTSE8> (the ‘May 12 Bloomberg Article’),” on which Moving Defendants purport Lead Plaintiff relies “to form the basis of his new loss causation theory,” Defs.’ Req. at 1, 5 (citing CAC ¶¶ 131, 132); *see id.* Ex. D;
- (5) “Ed Silverman’s www.wsj.com article on May 13, 2015, titled, ‘Orexigen and Takeda Feud Over Cost of a Controversial Diet Drug Trial,’ which is publicly

1 available at [https://blogs.wsj.com/pharmalot/2015/05/13/orexigen-and-](https://blogs.wsj.com/pharmalot/2015/05/13/orexigen-and-takeda-feud-over-cost-of-a-controversial-diet-drug-trial/)
 2 [takeda-feud-over-cost-of-a-controversial-diet-drug-trial/](https://blogs.wsj.com/pharmalot/2015/05/13/orexigen-and-takeda-feud-over-cost-of-a-controversial-diet-drug-trial/) (the ‘March 13 WSJ
 3 Article’),” on which Moving Defendants purport Lead Plaintiff relies “to form
 4 the basis of his new loss causation theory,” Defs.’ Req. at 2, 5 (citing CAC ¶¶
 131, 132); *see id.* Ex. E; and

- 5 (6) “Alex Keown and Riley McDermid’s www.biospace.com article on May 13,
 6 2015, titled, ‘Takeda Threatens to End Orexigen Partnership Over Stopped
 7 Obesity Study,’ which is publicly available at
 8 [https://www.biospace.com/article/takeda-threatens-to-end-orexigen-](https://www.biospace.com/article/takeda-threatens-to-end-orexigen-partnership-over-stopped-obesity-study-/)
 9 [partnership-over-stopped-obesity-study-/](https://www.biospace.com/article/takeda-threatens-to-end-orexigen-partnership-over-stopped-obesity-study-/) (the ‘May 13 BioSpace Article’),”
 10 on which Moving Defendants purport Lead Plaintiff relies “to form the basis
 11 of his new loss causation theory,” Defs.’ Req. at 2, 5 (citing CAC ¶¶ 131,
 12 132); *see id.* Ex. F.

11 Lead Plaintiff argues that Moving Defendants impermissibly are “offering these
 12 exhibits for the truth of the underlying facts they contain,” Opp’n at 19, because, for
 13 example, the language from the March 3, 2015 8-K cited in Moving Defendants’ Motion
 14 “is the *same language* that Defendants relied on to argue that the statements they made on
 15 March 3 were not false – a theory which was squarely rejected by the Ninth Circuit,” and
 16 accordingly “[i]t is unclear why Defendants would have cited to this language *if not* to try
 17 to impermissibly contradict Lead Plaintiff’s well-pled allegations,” *id.* (emphasis in
 18 original) (citing Mot. at 5; *Khoja*, 899 F.3d at 1003, 1010). Lead Plaintiff further “disputes
 19 that incorporating Ex. F is permissible, as it is only referred to briefly and for the prospect
 20 that Takeda’s disclosure caused Orexigen’s stock price to fall.” *Id.* (citing CAC ¶ 131).
 21 Lead Plaintiff argues that, if incorporation of these articles is proper, the incorporation
 22 “does not extend to Defendants’ factual conclusions or characterizations of their content,”
 23 *id.* at 19–20 (citing *Khoja*, 899 F.3d at 1006), and thus “asking the Court to incorporate a
 24 conclusion that these articles ‘do not suggest any connection’ between Defendants’ March
 25 3, 2015 misleading statements and Takeda’s, *Bloomberg’s* and the *Wall Street Journal’s*
 26 disclosures . . . goes ‘beyond testing the sufficiency of the claims and into the realm of
 27 factual disputes,’” *id.* at 20 (quoting *Khoja*, 899 F.3d at 1006; citing CAC ¶ 131).

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1 The Court previously has incorporated by reference Exhibits A through C. *See* ECF
 2 No. 76 at 18; ECF No. 110 at 18–19. In its September 23, 2019 Order, the Court found
 3 that incorporation by reference of Exhibits A and B, for the same purposes offered here,
 4 was proper. *See* ECF No. 110 at 18. The Court again finds incorporation by reference
 5 proper for Exhibits A and B. With regard to Exhibit C, the Court’s September 23, 2019
 6 Order noted that Lead Plaintiff’s “Consolidated Complaint refers extensively to the
 7 March 3, 2015 Form 8-K, *see, e.g.*, CC ¶¶ 87–88, which also forms the basis of Lead
 8 Plaintiff’s claims predicated upon false and misleading omissions in that very filing. *See,*
 9 *e.g., id.* ¶¶ 87–92.” ECF No. 110 at 18. The Court concluded that, “[a]lthough ‘what
 10 inferences [the C]ourt may draw from [the] incorporated document should . . . be
 11 approached with caution,’ *see Khoja*, 899 F.3d at 1003, Exhibit C is appropriately
 12 incorporated by reference.” ECF No. 110 at 18–19. The Court again finds it appropriate
 13 to incorporate Exhibit C by reference, but the Court will not incorporate into the CAC any
 14 statements therein offered solely to contest any well-pleaded facts in the CAC.

15 As for Exhibits D through F, the Court finds that Lead Plaintiff relies on the May
 16 12, 2015 *Bloomberg* article to form the basis of his loss causation theory, and therefore the
 17 Court concludes that it is appropriate to incorporate by reference Exhibit D. Again, the
 18 scope of the Court’s incorporation by reference will exclude “Defendants’ factual
 19 conclusions or characterizations of” the document. *See* Opp’n at 19–20. However, the
 20 Court agrees with Lead Plaintiff that it is not appropriate to incorporate Exhibits E and F
 21 by reference. The CAC does not refer extensively to these documents, nor does Lead
 22 Plaintiff rely on them to form the basis of his claim. As the Ninth Circuit has stated, “[f]or
 23 ‘extensively’ to mean anything under *Ritchie*, it should, ordinarily at least, mean more than
 24 once.” *See Khoja*, 899 F.3d at 1003 (citing *Coto*, 593 F.3d at 1038). “Otherwise, the rule
 25 would simply require a complaint to ‘refer’ to the document. In theory, a reference may
 26 be sufficiently ‘extensive’ if a single reference is relatively lengthy.” *Id.* However, the
 27 CAC only refers to each of Exhibits E and F once, and then only for the proposition that
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1 the share prices dropped on May 13, 2015. *See* CAC ¶ 131. Thus, the Court sees no reason
2 to incorporate these ancillary documents by reference.

3 Accordingly, the Court **GRANTS IN PART AND DENIES IN PART** Moving
4 Defendants’ Request to Consider Documents Incorporated by Reference (ECF No. 114-9),
5 as outlined above.

6 **PARTIAL MOTION TO DISMISS**

7 **I. Legal Standard**

8 Rule 12(b)(6) permits a party to raise by motion the defense that the complaint
9 “fail[s] to state a claim upon which relief can be granted,” generally referred to as a motion
10 to dismiss. The Court evaluates whether a complaint states a cognizable legal theory and
11 sufficient facts in light of Federal Rule of Civil Procedure 8(a), which requires a “short and
12 plain statement of the claim showing that the pleader is entitled to relief.” Although Rule
13 8 “does not require ‘detailed factual allegations,’ . . . it demands more than an unadorned,
14 the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
15 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, “a
16 plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more
17 than labels and conclusions, and a formulaic recitation of a cause of action’s elements will
18 not do.” *Twombly*, 550 U.S. at 555 (alteration in original). “Nor does a complaint suffice
19 if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*, 556 U.S.
20 at 678 (alteration in original) (quoting *Twombly*, 550 U.S. at 557).

21 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
22 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting
23 *Twombly*, 550 U.S. at 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible
24 when the facts pled “allow[] the court to draw the reasonable inference that the defendant
25 is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). That is not to
26 say that the claim must be probable, but there must be “more than a sheer possibility that a
27 defendant has acted unlawfully.” *Id.* (citing *Twombly*, 550 U.S. at 556). “[F]acts that are
28 ‘merely consistent with’ a defendant’s liability” fall short of a plausible entitlement to

1 relief. *Id.* (quoting *Twombly*, 550 U.S. at 557). Further, the Court need not accept as true
 2 “legal conclusions” contained in the complaint. *Id.* at 678–79 (citing *Twombly*, 550 U.S.
 3 at 555). This review requires “context-specific” analysis involving the Court’s “judicial
 4 experience and common sense.” *Id.* at 679. “[W]here the well-pleaded facts do not permit
 5 the court to infer more than the mere possibility of misconduct, the complaint has alleged—
 6 but it has not ‘show[n]’—‘that the pleader is entitled to relief.’” *Id.* (quoting Fed. R. Civ.
 7 P. 8(a)(2)).

8 Further, “[c]laims brought under Rule 10b-5 . . . must meet Federal Rule of Civil
 9 Procedure 9(b)’s particularity requirement that ‘[i]n all averments of fraud or mistake, the
 10 circumstances constituting fraud or mistake shall be stated with particularity.’” *In re Dura*
 11 *Pharm., Inc. Sec. Litig.*, 452 F. Supp. 2d 1005, 1016 (S.D. Cal. 2006) (alteration in original)
 12 (quoting Fed. R. Civ. P. 9(b)) (citing *In re Daou Sys., Inc. Sec. Litig.*, 411 F.3d 1006, 1014
 13 (9th Cir. 2005), *cert. denied* 546 U.S. 1172 (2006); *Yourish v. Cal. Amplifier*, 191 F.3d
 14 983, 993 (9th Cir. 1999)). “In addition, in 1995, Congress enacted the Private Securities
 15 Litigation Record Act of 1995 (PSLRA) and altered the pleading requirements in private
 16 securities fraud litigation by requiring a complaint plead with particularity both falsity and
 17 scienter.” *Id.* at 1016–17 (quoting *Daou Sys.*, 411 F.3d at 1014) (internal quotation marks
 18 omitted).

19 The Court will grant leave to amend unless it determines that no modified contention
 20 “consistent with the challenged pleading . . . [will] cure the deficiency.” *DeSoto v. Yellow*
 21 *Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) (quoting *Schriber Distrib. Co. v. Serv-*
 22 *Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)).

23 **II. Analysis**

24 “Section 10(b) of the . . . 1934 [Act] forbids (1) the ‘use or employ[ment] . . . of any
 25 . . . deceptive device,’ (2) ‘in connection with the purchase or sale of any security,’ and
 26 (3) ‘in contravention of’ [SEC] ‘rules and regulations.’” *Dura Pharm., Inc. v. Broudo*, 544
 27 U.S. 336, 341 (2005) (quoting 15 U.S.C. § 78j(b)). “Rule 10b-5 forbids, among other
 28 things, the making of any ‘untrue statement of a material fact’ or the omission of any

1 material fact ‘necessary in order to make the statements made . . . not misleading.’” *Id.*
 2 (quoting 17 C.F.R. § 240.10b-5). “The basic elements of a Rule 10b-5 claim, therefore,
 3 are: (1) a material misrepresentation or omission of fact, (2) scienter, (3) a connection with
 4 the purchase or sale of a security, (4) transaction and loss causation, and (5) economic
 5 loss.” *Daou Sys.*, 411 F.3d at 1014 (citing *Dura Pharms.*, 544 U.S. at 341–42).

6 Although Moving Defendants claim that their Motion is directed solely to the issue
 7 of loss causation, in actuality, the Motion argues that Lead Plaintiff’s CAC fails to
 8 adequately plead several of the required elements of a claim for securities fraud. Primarily,
 9 Moving Defendants assert that Lead Plaintiff has not adequately pleaded loss causation in

10 alleg[ing] that investors learned on May 12, 2015 that Takeda
 11 Pharmaceutical Co. Ltd. (“Takeda”)—Orexigen’s commercial
 12 partner in conducting the Light Study—initiated a “\$200 million
 13 action” against Defendants which purportedly revealed for the
 14 first time that Orexigen disclosed the data underlying the patent
 15 on March 3 without notifying Takeda in advance.

16 Mot. at 2 (citing CAC ¶ 132) (footnote omitted). However, Moving Defendants also argue
 17 that Lead Plaintiff fails to plead falsity adequately, because Defendants had no duty to
 18 inform investors that the March 3, 2015 8-K was filed without first informing Takeda. *Id.*
 19 at 12 (citing CAC ¶ 132). Moving Defendants further claim that the CAC contains no
 20 allegations to support the materiality of the allegedly misleading statement or omission.
 21 *Id.* at 13–14 (citations omitted).⁴

22 ⁴ In a footnote, Moving Defendants assert a fourth argument, that “[t]he Amended Complaint is also bereft
 23 of allegations that Defendants intended to deceive or were deliberately reckless in failing to inform
 24 investors that Takeda allegedly did not have advance notice of the March 3 8-K. Thus, any such claim
 25 should also be dismissed for failure to plead scienter.” Mot. at 14 n.12 (citing *Ronconi v. Larkin*, 253 F.3d
 423, 432 (9th Cir. 2001)). Similarly, Lead Plaintiff responds to the argument in a single sentence in a
 footnote in his Opposition. Opp’n at 14 n.7.

26 The Court declines to address this argument, which was not fully briefed by the Parties. “‘Arguments
 27 raised only in footnotes, or only on reply, are generally deemed waived’ and need not be considered.”
 28 *Cheever v. Huawei Device USA, Inc.*, No. 18-CV-06715-JST, 2019 WL 8883942, at *3 (N.D. Cal. Dec.
 4, 2019) (citing *Estate of Saunders v. Comm’r*, 745 F.3d 953, 962 n.8 (9th Cir. 2014); *Sanders v. Sodexo*,
Inc., No. 2:15-cv-00371-JAD-GWF, 2015 WL 4477697, at *5 (D. Nev. July 20, 2015) (“Many courts will

1 **A. Material Misrepresentation or Omission of Fact**

2 The Court will first address Moving Defendants’ argument that Lead Plaintiff fails
 3 to plead a material misrepresentation or omission of fact. Mot. at 12. A statement or
 4 omission is misleading “if it would give a reasonable investor the ‘impression of a state of
 5 affairs that differs in a material way from the one that actually exists.’” *Berson v. Applied*
 6 *Signal Tech., Inc.*, 527 F.3d 982, 985 (9th Cir. 2008) (quoting *Brody v. Transitional Hosps.*
 7 *Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002)). With regards to an omission, “[d]isclosure is
 8 required . . . only when necessary to make . . . statements made, in the light of the
 9 circumstances under which they were made, not misleading.” *Khoja*, 899 F.3d at 1009
 10 (internal quotation marks and citations omitted). Thus, “companies can control what they
 11 have to disclose under these provisions by controlling what they say to the market.” *Id.*
 12 (citations and internal quotation marks omitted). “But once defendants [choose] to tout
 13 positive information to the market, they [are] bound to do so in a manner that wouldn’t
 14 mislead investors, including disclosing adverse information that cuts against the positive
 15 information.” *Id.* (citations and internal quotation marks omitted) (alterations in original).

16 “[A]n omitted fact is material if there is a substantial likelihood that a reasonable
 17 shareholder would consider it important.” *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988)
 18 (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). “[T]here must be
 19 a substantial likelihood that the disclosure of the omitted fact would have been viewed by
 20 the reasonable investor as having significantly altered the ‘total mix’ of information made
 21 available.” *Id.* at 231–32 (quoting *TSC Indus.*, 426 U.S. at 449). “At a minimum,
 22 ‘[p]laintiffs’ allegations must suffice to raise a reasonable expectation that discovery will
 23 reveal evidence satisfying the materiality requirement, and to allow the court to draw the
 24 reasonable inference that the defendant is liable.” *Khoja*, 899 F.3d at 1009 (quoting *In re*
 25 *Atossa Genetics Inc. Sec. Litig.*, 868 F.3d at 794).

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 27
 28 disregard arguments raised exclusively in footnotes.” (quoting Bryan Garner, *The Redbook: A Manual on*
Legal Style 168 (3d ed. 2013))).

1 Moving Defendants argue that “Plaintiff cannot establish falsity, because
 2 Defendants had no duty to inform investors that Orexigen filed the March 3 8-K ‘without
 3 first informing Takeda.’” Mot. at 12 (quoting CAC ¶ 132). Moving Defendants analogize
 4 to Lead Plaintiff’s former claim that Defendants misled investors by failing to disclose that
 5 Orexigen had violated the DAP on March 3, 2015, which information the Ninth Circuit
 6 determined Defendants had no duty to share “‘because Orexigen never touted having
 7 permission to publish’ the 25% data on that date.” Mot. at 13 (quoting *Khoja*, 899 F.3d at
 8 1011). Finally, Moving Defendants argue that, even if any statement or omission were
 9 actionable, it must also be material, but “the [CAC] contains no allegations to suggest that
 10 a reasonable investor would even care” about Orexigen’s alleged failure to give Takeda
 11 advance notice of the March 3, 2015 8-K. Mot. at 13 (footnote omitted).

12 Lead Plaintiff argues that this argument “conflates the standards for evaluating
 13 whether a defendant has a duty to disclose material information with those for proximate
 14 cause.” Opp’n at 13. While it is true, as this Court noted *supra* at 14, that this argument
 15 does not relate to loss causation, purportedly the only subject of Moving Defendants’
 16 Motion,⁵ a material misrepresentation or omission of fact is nonetheless a required element
 17 of a claim for securities fraud that Lead Plaintiff must plead in order to state a claim, and
 18 Lead Plaintiff was put on notice of this argument by Moving Defendants’ thorough
 19 treatment of the issue in their opening brief. *See* Mot. at 12–14. Indeed, Lead Plaintiff’s
 20 Opposition contains a section titled “Defendants’ Violation of Their Duty Not to Mislead
 21 the Public Has Been Established and is Law of the Case.” Opp’n at 13. However, the
 22 section bearing this heading is largely devoted to the reasonable foreseeability of Takeda’s
 23 decision to seek termination of its partnership with Orexigen in light of the alleged March
 24 3, 2015 omissions, *id.*, and concedes that the Ninth Circuit “found that Defendants did not
 25 have a duty to disclose that it had violated the DAP,” *id.* (citation omitted).

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 28 ⁵ *See, e.g.*, Not. of Mot. at 1 (indicating Moving Defendants move for dismissal in part of the CAC “for failure to plead loss causation”).

1 The Court agrees with Moving Defendants that Lead Plaintiff fails to plead
 2 adequately this element of his claim, to the extent it is premised on the May 12, 2015
 3 *Bloomberg* article correcting any misleading statements or omissions from March 3, 2015.
 4 Although Lead Plaintiff alleges that “Orexigen filed the Form 8-K without first consulting
 5 with the FDA, Dr. Nissen or its own business partner, Takeda,” CAC ¶ 15, Lead Plaintiff
 6 does not allege that Moving Defendants had a duty to disclose their failure to provide
 7 Takeda with advance notice, nor can the Court plausibly infer from the allegations in the
 8 CAC that such a duty existed. Rather, the Court agrees with Moving Defendants that this
 9 scenario is similar to Lead Plaintiff’s unsuccessful attempt to plead that it was misleading
 10 for Defendants to fail to disclose that the publication of the 25% LIGHT Study data violated
 11 the DAP. In dismissing this theory, the Ninth Circuit reasoned:

12 Although Orexigen touted the interim results and therefore
 13 created a duty to disclose the corresponding adverse information,
 14 Orexigen never touted having permission to publish the results.
 15 Even though violating the DAP could have negative
 16 consequences for Orexigen (and its investors), Orexigen did not
 have a duty to share that information. The Complaint does not
 identify earlier statements by Orexigen that suggest a duty either.

17 *Khoja*, 899 F.3d at 1011. Similarly, here, Lead Plaintiff does not allege that Orexigen
 18 touted that it had informed Takeda of its intention to publish the 25% LIGHT Study data,
 19 or that Takeda had approved of its decision to do so. Absent a duty to disclose, there is no
 20 actionable misleading omission. And, while Defendants’ duty to disclose that the 25%
 21 LIGHT Study data were unreliable is certainly law of the case, Defendants’ duty to disclose
 22 whether or not they had told Takeda of their intention to disclose those data is not.
 23 Accordingly, Lead Plaintiff fails to state a claim to the extent he relies on Moving
 24 Defendants’ failure to disclose that they did not inform Takeda in advance of their intention
 25 to file the March 3, 2015 8-K.⁶

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 28 ⁶ In light of the Court’s finding that Lead Plaintiff fails to state a claim due to his failure adequately to
 allege a misrepresentation or omission, the Court need not address the materiality of the same.

1 **B. Loss Causation**

2 The Court next addresses Moving Defendants’ argument that Lead Plaintiff fails to
3 adequately plead loss causation. Mot. at 10–12. To demonstrate loss causation, a plaintiff
4 must allege “a causal connection between the material misrepresentation and the loss.”
5 *Dura Pharms.*, 544 U.S. at 342; *see also* 15 U.S.C. § 78u-4(b)(4). The Ninth Circuit
6 recently held that, to plead loss causation

7 by relying on one or more corrective disclosures, a plaintiff must
8 show that: (1) a corrective disclosure revealed, in whole or in
9 part, the truth concealed by the defendant's misstatements; and
10 (2) disclosure of the truth caused the company's stock price to
11 decline and the inflation attributable to the misstatements to
12 dissipate. At the pleading stage, the plaintiff's task is to allege
with particularity facts “plausibly suggesting” that both
showings can be made.

13 *In re BofI Holding, Inc. Sec. Litig.*, No. 18-55415, __ F.3d __, 2020 WL 5951150, at *6
14 (9th Cir. Oct. 8, 2020) (citing *Twombly*, 550 U.S. at 557; *Oregon Public Employees*
15 *Retirement Fund v. Apollo Group, Inc.*, 774 F.3d 598, 605 (9th Cir. 2014)). Although Rule
16 9(b)’s heightened pleading standard applies to allegations of loss causation, “[t]hat effort
17 ‘should not prove burdensome,’ for even under Rule 9(b) the plaintiff’s allegations will
18 suffice so long as they give the defendant ‘notice of plaintiffs’ loss causation theory’ and
19 provide the court ‘some assurance that the theory has a basis in fact.’” *Id.* at *8 (quoting
20 *Dura Pharms.*, 544 U.S. at 347; *Berson v. Applied Signal Technology, Inc.*, 527 F.3d 982,
21 989–90 (9th Cir. 2008)).

22 Moving Defendants argue that Lead Plaintiff fails to allege that the disclosures in
23 the May 12, 2015 *Bloomberg* article correct any allegedly false or misleading statement
24 appearing in the March 3, 2015 8-K. Mot. at 10–12. Specifically, Moving Defendants
25 argue that only two statements from March 3, 2015 “remain at issue”: (1) the failure to
26 reveal in the March 3, 2015 8-K that the 25% LIGHT Study results were “unreliable,” and
27 (2) Defendants’ failure to disclose in the March 3, 2015 press release their role in

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1 publishing the '371 patent.⁷ Mot. at 10. Moving Defendants contend that Lead Plaintiff
 2 does not allege that these statements were false or misleading “*because* of anything
 3 Defendants said about Takeda, or because of any omission related to Takeda.” *Id.* at 10–
 4 11 (emphasis in original) (citing CAC ¶¶ 92, 95, 98). Moving Defendants further argue
 5 that,

6 even if there was a statement on March 3 to tie back to, the May
 7 12 articles that disclose Takeda’s initiation of dispute
 8 proceedings against Orexigen do not actually reveal that
 9 “Defendants had failed to disclose” that Orexigen filed the
 10 March 3 8-K “without first informing Takeda.” Thus, Plaintiff
 11 has not even pleaded an alleged corrective disclosure in the first
 12 place. Indeed, those articles do not suggest any connection
 13 whatsoever between Takeda’s claims for breach of the
 14 collaboration agreement and Orexigen’s alleged failure to
 15 provide advance notice of the March 3 8-K.

16 *Id.* at 11 (citing CAC ¶¶ 131–32; Exs. D, E, F). Finally, even if such a connection were
 17 established, Moving Defendants claim, analogizing to cases addressing the revelation of
 18 litigation or investigations, that the mere allegation that “Takeda had sued Orexigen for
 19 ‘material breach’ based on Orexigen’s failure to give notice of the March 3 8-K” is
 20 inadequate, standing on its own, to establish loss causation. *Id.* at 12 n.9 (citations omitted).

21 Lead Plaintiff responds that:

22 The May 12, 2015 disclosures make clear for the first time that
 23 Takeda wanted to dissolve its partnership with Defendants based
 24 on “Orexigen’s material breach of the agreement.” The facts
 25 before the Court strongly suggest that this breach relates back to
 26 Defendant’s unilateral decisions to: (i) publish the unreliable
 27 25% interim data; and (ii) hide their role in getting the patent
 28 published. These allegations are “inextricably linked” with
 Takeda’s announcement that they were seeking to dissolve their
 partnership with Orexigen and leave them with the entire cost of
 the subsequent safety [*sic*].

⁷ Lead Plaintiff appears to agree that these two statements from March 3, 2015 are the only ones relevant to the loss causation issue. *See, e.g.,* Opp’n at 16.

1 Opp'n at 16 (citing CAC ¶ 131; *In re Silver Wheaton Corp. Sec. Litig.*, 2019 U.S. Dist.
2 LEXIS 59428, at *40 (C.D. Cal. 2019)). Thus,

3 Defendants' decision to publicize the unreliable 25% interim
4 data is the proximate cause of: (i) the LIGHT Study's
5 cancellation; (ii) the FDA's warning that Contrave might be
6 pulled from the market; and (iii) Takeda's decision to institute
7 dispute resolution proceedings. Since Takeda had known since
8 late 2014 that the FDA would require another safety study, there
is no other reason that it would have resorted to such aggressive
tactics at that time. Moreover, Defendants do not offer one here.

9 *Id.* at 17 (citing CAC ¶¶ 55, 126). Lead Plaintiff argues that Moving Defendants' analogy
10 to government investigation cases is inapt because an announcement of an investigation
11 with something more, such as a corrective disclosure, can establish loss causation, and
12 "[h]ere, Takeda's announcement, along with the news that [the] LIGHT Study had been
13 terminated prematurely, and following Dr. Jenkins' March 5 warning 'gave investors the
14 context necessary to interpret [Takeda's disclosure] as revealing the fraud.'" *Id.* at 18
15 (citing *Evanston Police Pension Fund v. McKesson Corp.*, 2019 U.S. Dist. LEXIS 188308,
16 at *44 (N.D. Cal. 2019)) (third alteration in original).

17 Furthermore, according to Lead Plaintiff, the May 12, 2015 *Bloomberg* article's
18 disclosure of Takeda's actions "was a reasonably foreseeable consequence" of Orexigen's
19 duty to disclose the unreliability of the 25% interim LIGHT Study data in the March 3,
20 2015 8-K. *Id.* at 13 (citing *Khoja*, 899 F.3d at 1012–13). Thus, the Ninth Circuit's analysis
21 of the DAP issue in *Khoja* supports his argument because, although the Ninth Circuit found
22 no duty to disclose the alleged violations of the DAP, "it identified potential violations (and
23 thus, the attendant risks) as a reasonably foreseeable outcome of their March 3, 2015
24 misstatements and omissions," which are "likely material to reasonable investors." *Id.*
25 (citing *Khoja*, 899 F.3d at 1013). Ultimately, "whether Orexigen may not have had an
26 affirmative duty to disclose information about its relationship with Takeda, does not mean
27 that such information does not 'relate back to the fraud.'" *Id.* at 14 (footnote omitted).

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1 In their Reply, Moving Defendants argue that none of the reasons why the March 3,
 2 2015 misstatements are materially false or misleading, as alleged in the CAC, are related
 3 to the purported failure to provide notice of the March 3, 2015 8-K to Takeda. Reply at 2–
 4 3. This “failure to allege that the March 3 8-K was false or misleading because of anything
 5 said or not said about Takeda is dispositive.” *Id.* at 4. Moving Defendants further argue
 6 that, because Lead Plaintiff’s sole loss causation theory pleaded in the CAC is a market-
 7 revelation theory, Lead Plaintiff cannot rely on a foreseeable consequences and/or
 8 outcomes theory. Reply at 5; *see id.* at n.4. Even so, Lead Plaintiff’s argument that the
 9 May 12, 2015 *Bloomberg* article establishes that Takeda’s actions related back to the
 10 decision to publish the unreliable interim LIGHT Study data is nothing but unsupported
 11 speculation that does not satisfy the pleading requirements of *Twombly*. *Id.* at 5–7; *see*
 12 *also id.* at 7 n.7.

13 Having carefully reviewed the pleadings and the Parties’ arguments, the Court
 14 agrees that the facts currently alleged in the CAC, viewed in the light most favorable to
 15 Lead Plaintiff, simply do not allege a link sufficient for the Court to find that the May 12,
 16 2015 *Bloomberg* article was a “correction” of any false or misleading statements or
 17 omissions made on March 3, 2015, or that the *Bloomberg* article “relates back” to the
 18 March 3, 2015 statements or omissions. The Court agrees with Moving Defendants that
 19 Lead Plaintiff’s argument that Takeda’s decision to send a letter on May 12, 2015
 20 instituting dispute resolution proceedings against Orexigen necessarily relates back to
 21 Orexigen’s failure to disclose the unreliability of the 25% LIGHT Study data is
 22 unsupported.

23 As the Ninth Circuit stated in *Metzler Investments GMBH v. Corinthian Colleges,*
 24 *Incorporated*:

25 [W]hile the court assumes that the facts in a complaint are true,
 26 it is not required to indulge unwarranted inferences in order to
 27 save a complaint from dismissal. The TAC’s allegation that the
 28 market understood the June 24 and August 2 disclosures as a
 revelation of Corinthian's systematic manipulation of student

1 enrollment is not a “fact.” It is an inference that Metzler believes
 2 is warranted from the facts that are alleged. But Corinthian
 3 persuasively explains why this is not the case.

4 540 F.3d 1049, 1064–65 (9th Cir. 2008) (citing *In re Syntex Corp. Sec. Litig.*, 95 F.3d 922,
 5 926 (9th Cir. 1996)). On the facts presently alleged in the CAC, the Court simply cannot
 6 accept as plausible the chain of inferences necessary to permit the May 12, 2015 *Bloomberg*
 7 article to relate back to the March 3, 2015 statements or omissions at issue. The May 12,
 8 2015 *Bloomberg* article does not identify what “material breach” of Orexigen and Takeda’s
 9 agreement led Takeda to institute dispute resolution proceedings against Orexigen. *See*
 10 Reply at 5–6; *see also* Defs.’ Req. Ex. D. Lead Plaintiff claims there can be “no other
 11 reason” why Takeda would have resorted to this action at this time. Opp’n at 17 (emphasis
 12 omitted). But the Court does not find this inference credible. More than nine weeks had
 13 passed between the March 3, 2015 disclosures and Takeda’s sending of the letter alleging
 14 a breach of its agreement with Orexigen on May 12, 2015. *See* Defs.’ Req. Ex. D. It is
 15 unlikely Takeda would have waited more than two months to send a letter alleging a breach
 16 were the March 3, 2015 disclosures the trigger for the letter. Accordingly, the Court further
 17 finds that Lead Plaintiff has failed to adequately plead that the May 12, 2015 *Bloomberg*
 18 article relates back to the allegedly misleading statements or omissions from March 3, 2015
 19 in such a way as to satisfactorily plead loss causation.

20 ***C. Lead Plaintiff’s Notices of Supplemental Authority***

21 The four notices of supplemental authority filed by Lead Plaintiff do not alter the
 22 Court’s view that the allegations of the CAC are insufficient to state a claim to the extent
 23 they rely on linking the May 12, 2015 *Bloomberg* article to any misstatements or omissions
 24 from March 3, 2015.⁸

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 27 ⁸ The Court notes that Moving Defendants objected to Lead Plaintiff’s Second Notice for exceeding “[t]he
 28 purpose and permissible scope of a notice of supplemental authorities.” Resp. to 2d Not. of Supp. Auth.
 at 1. While Lead Plaintiff does use its Notices to provide further arguments and commentary, Moving
 Defendants rebutted those arguments, at least as to the first two Notices and the fourth Notice, and had an

1 Lead Plaintiff's First Notice concerns *Karinski v. Stamps.com*, Case No. 19-cv-
 2 1828-MWF (SKx), 2020 WL 281716 (C.D. Cal. Jan. 17, 2020). *See generally* 1st Not. of
 3 Supp. Auth. However, *Karinski* is distinguishable from the facts before this Court. First,
 4 in *Karinski*, the court determined that Stamps.com had a duty to disclose USPS's
 5 opposition to Stamps.com's reseller program, and therefore had made a misleading
 6 statement, because it "touted its strong relationship with USPS and USPS's approval of
 7 Stamps' business model." 2020 WL 281716, at *12. Here, Defendants made no
 8 misleading statement because there are not sufficient allegations in the CAC to infer that
 9 Orexigen had a duty to disclose whether it had informed Takeda in advance that it was
 10 going to publish the 25% interim LIGHT Study results in its March 3, 2015 8-K. *See supra*
 11 at 16–17. Moreover, the corrective disclosures at issue in *Karinski* pertained directly to
 12 the alleged misstatements or omissions, as the first announcement concerned the
 13 termination of Stamps.com's exclusive relationship with USPS, "which itself was the
 14 subject of the alleged false statements," and the second announcement concerned the
 15 reseller program that was allegedly fraudulent. 2020 WL 281716, at *17–18. Here, the
 16 connection between the alleged misstatements or omissions and the alleged corrective
 17 disclosure, however, is too tenuous to adequately plead loss causation. *See supra* at 18–
 18 22.

19 Lead Plaintiff's Second Notice concerns *In re Twitter, Inc. Securities Litigation*,
 20 Case No. 16-cv-05314-JST, 2020 WL 4187915 (N.D. Cal. Apr. 17, 2020). *See generally*
 21 2d Not. of Supp. Auth. Again, however, the Court finds the facts in *Twitter* distinguishable.
 22 There, the court concluded that there could be a duty to disclose declining DAU/MAU
 23 trends in light of Twitter's statements that, "[i]n our more mature markets, we have very
 24 high DAU to MAU, 50% plus," 2020 WL 4187915, at *7 (internal quotation marks
 25 omitted); "our MAU trend has already turned around," *id.* at *9 (same); and "DAU to MAU
 26

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 28 opportunity to do so regarding the third. Ultimately, while the Court has reviewed the Parties' arguments,
 it has conducted its own analysis of the authorities brought to its attention in the Notices.

ratios in the quarter were similar to what they were by market relative to Analyst Day,” *id.* at *11 (same). Thus, Twitter had touted information that potentially required further disclosure. The Court here, on the other hand, has found that not to be the case. *See supra* at 16–17. Moreover, as relevant to loss causation, the corrective disclosures directly concerned MAUs and/or DAU/MAU ratios, making clear the relationship of these statements to the omission of the declining DAU/MAU trends. *See* 2020 WL 4187915, at *15–18. But, as the Court here has concluded, Lead Plaintiff has failed to adequately allege that the disclosures in the May 12, 2015 *Bloomberg* article adequately relate back to any of the alleged omissions or misstatements from March 3, 2015. *See supra* at 18–22.

Lead Plaintiff’s Third Notice concerns *In re WageWorks, Inc., Securities Litigation*, Case No. 18-CV-01523-JSW, 2020 WL 2896547 (N.D. Cal. June 1, 2020). *See generally* 3d Not. of Supp. Auth. Again, the Court finds the relevant facts to be distinguishable. In *WageWorks*, the lead plaintiffs alleged that, “[b]etween August 2016 and February 2017, WageWorks improperly recognized revenue from the OPM contract, even though administration of benefits had not begun,” and “failed to write down the value of . . . a software platform” that was no longer required by a client. 2020 WL 2896547, at *1. In allegedly inflated SEC filings, several of the defendants “made statements highlighting the benefits of the OPM contract and certifying that WageWorks’ financial reporting controls were adequate.” *Id.* However, after KPMG refused to certify WageWorks’ 2017 Annual Report, WageWorks issued a press release indicating “that WageWorks’ previous controls were inadequate due to the ‘tone at the top’ and that previous financial statements ‘should no longer be relied upon.’” *Id.* at *2. And, in its 2017 Form 10-K, WageWorks acknowledged that “‘material weaknesses in internal controls’ . . . led to false material statements in 2016 and 2017, and “‘[i]n the second quarter of 2016, the client notified [WageWorks] that it no longer required the services,’ which rendered the [software platform]’s value ‘unrecoverable.’” *Id.* Thus, in *WageWorks*, the alleged corrective disclosures correlated to the allegedly inflated revenue reporting. That is not the case here. *See supra* at 18–22.

1 Finally, Lead Plaintiff's Fourth Notice concerns *In re BofI Holding, Inc. Securities*
 2 *Litigation*, No. 18-55415, __ F.3d __, 2020 WL 5951150 (9th Cir. Oct. 8, 2020). *See*
 3 *generally* 4th Not. of Supp. Auth.; Reply ISO 4th Not. of Supp. Auth. Once more, the
 4 Court finds the facts of *BofI* distinguishable. First, in *BofI*, "the shareholders allege that
 5 defendants made false or misleading statements touting the bank's conservative loan
 6 underwriting standards, its effective system of internal controls, and its robust compliance
 7 infrastructure." 2020 WL 5951150, at *2. BofI was not accused of misleading omissions,
 8 so the issue here of a failure to allege adequately a duty to disclose was absent.

9 Second, in *BofI*, the alleged corrective disclosure was "a whistleblower lawsuit filed
 10 against BofI by Charles Erhart, a former mid-level auditor at the company." *Id.* at *3. The
 11 Ninth Circuit found that "[t]he allegations of egregious wrongdoing in the Erhart lawsuit,
 12 if accepted as true, unquestionably revealed to the market that at least some of BofI's
 13 alleged misstatements were false." *Id.* at *6. For instance, one of the allegations was "that
 14 [Erhart] personally prepared a memorandum . . . which identified roughly 30% of BofI's
 15 customers as 'bad,' meaning the customers had red flags such as suspiciously high cash
 16 balances, social security numbers that did not match any public records, and, in one
 17 instance, the social security number of a dead person," but "when he gave the list to his
 18 superior, Senior Vice President John Tolla, Tolla demanded that the audit committee alter
 19 the list and give the altered version to the OCC." *Id.* at *6. Thus, there's a clear connection
 20 between the alleged misleading statements and the correcting disclosure. While the Ninth
 21 Circuit noted that, to relate back, "a corrective disclosure need not be a mirror image of the
 22 prior misstatement," *id.* at *6 n.3 (citing *In re Williams Sec. Litig.—WCG Subclass*, 558
 23 F.3d 1130, 1140 (10th Cir. 2009)), the alleged corrective disclosure here bears almost no
 24 relation to the alleged misstatement or omission, and it would require the Court to accept
 25 unsupported and implausible inferences to find a causal connection between the alleged
 26 loss and the statements. Thus, this is more a case of "'asserting that where there is smoke,
 27 there must be fire.'" *Id.* at *8 (quoting *Curry v. Yelp Inc.*, 875 F.3d 1219, 1225 (9th Cir.
 28 ///

2017)). Accordingly, *BofI* does not help Lead Plaintiff on the facts presently pleaded in the CAC.⁹

Thus, in light of Lead Plaintiff's failure to allege adequately that the May 12, 2015 *Bloomberg* article relates back to a material misrepresentation or omission of fact from March 3, 2015, the Court **GRANTS** Moving Defendants' Motion.

D. Leave to Amend

Moving Defendants urge the Court to deny leave to amend, "as Plaintiff could never allege a cognizable fraud claim based on this theory." Mot. at 14. While the Court is skeptical that Lead Plaintiff will be able to allege adequately that the May 12, 2015 *Bloomberg* article relates back to the alleged misrepresentations or omissions from March 3, 2015, the Court also is not convinced that it is an impossibility, and Lead Plaintiff has not yet had an opportunity to amend these allegations. Thus, the Court will grant Lead Plaintiff one final opportunity to amend. Accordingly, the Court **DISMISSES** Plaintiff's claims to the extent they rely on a connection between the May 12, 2015 *Bloomberg* article and the March 3, 2015 misleading statements and/or omissions, but will do so **WITHOUT PREJUDICE**.

CONCLUSION

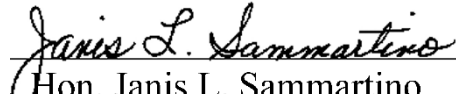
In light of the foregoing, the Court **GRANTS IN PART AND DENIES IN PART** Moving Defendants' Request to Consider Materials Incorporated by Reference (ECF No. 114-9) and **GRANTS** Moving Defendants' Motion (ECF No. 114). Lead Plaintiff **MAY FILE** an amended consolidated complaint within thirty (30) days of the date on which this
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⁹ Lead Plaintiff also makes much of the fact that, in *BofI*, the Ninth Circuit held that allegations in a lawsuit alone can serve as a corrective disclosure, and there need not be an additional disclosure to confirm the truth of those allegations. *See id.* at *7. Lead Plaintiff contends that Takeda, like Erhart, had "firsthand knowledge" of the alleged misconduct. 4th Not. of Supp. Auth. at 1. But the Court finds distinguishable allegations in a lawsuit, made by a person with firsthand knowledge and publicly filed for all to see, and an article written by a person without firsthand knowledge reporting on the mere sending of, and not the specific allegations in, a demand letter, even if the demand letter in question came from someone with firsthand knowledge of the alleged misconduct.

1 Order is electronically docketed. *Should Lead Plaintiff fail to file an amended complaint*
2 *by this date, this action will proceed on his surviving causes of action.*

3 **IT IS SO ORDERED.**

4 Dated: November 2, 2020


5 Hon. Janis L. Sammartino
6 United States District Judge
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